IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 4

ALLIED VAN LINES, a corporation,

Petitioner,

vs.

CARL G. ZIMMERMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

JOHN P. McCARTHY,
Manager, Legal Dep't.,
Allied Van Lines, Inc.,
2120 South 25th Avenue,
Broadview, Illinois,
Attorney for Petitioner.

CHAMPLIN-SHEALY COMPANY, CHICAGO 388

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion	16

APPENDIX.

Appendix A	17
Appendix B	24
Appendix C	31

CITATIONS.

Cases:

H. R. Mallison & Co. vs. Barrett (App. Div., Sup. Ct. of N. Y., 1926), 215 App. Div. 524, 213 N. Y. S. 652	7
New York, N. H. & H. R. Co. vs. Nothnagel (1953), 346 U. S. 128	6

Statutes:

Judicial Code, 28 U. S. C., Section 1254 (1)	2
Interstate Commerce Act, 49 U. S. C., Section 20 (11)	2, 3, 8, 10
Interstate Commerce Act, 49 U. S. C., Section 319	3
Interstate Commerce Act, 49 U. S. C., Section 316 (d)	3, 9, 10, 11
Interstate Commerce Act, 49 U S. C., Section 322 (c)	3, 9

PAGE

Miscellaneous Authorities:

Couch on Insurance 15

John M. Miller, Law of Freight Loss and Damage Claims, 2nd Ed., 1961 9

Richard S. Ries, Report and Recommended Order, served June 15, 1962, in Ex Parte MC-1, 19, 61 and 62, Practices of Motor Common Carriers of Household Goods 10, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No.

ALLIED VAN LINES, a corporation,

Petitioner.

vs.

CARL G. ZIMMERMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Allied Van Lines, a corporation, defendant in the Court below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on May 14, 1963.

OPINIONS BELOW

No opinion was filed by the District Court.

The opinion of the Court of Appeals, printed in Appendix A, hereto, *infra*, page 17, is reported in 317 F. 2d 72.

JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1963. A timely petition for rehearing was denied on June 11, 1963. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the Second Cummins Amendment to the Interstate Commerce Act *requires, permits or forbids* a motor common carrier subject thereto to limit its liability for cargo loss and damage to an amount less than the actual loss and damage sustained in a case where the shipper has underdeclared the value of his goods and has obtained the benefit of a lower transportation rate?

2. Whether Section 20 (11) of 49 U. S. C. is subject to the provisions of Section 316 (d) of 49 U. S. C. prohibiting any regulated motor common carrier from giving or causing any undue or unreasonable preference or advantage to any particular person or subjecting any particular person to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever?

3. Whether Section 1 (b) of the Contract Terms and Conditions contained in Petitioner's Bill of Lading establishes a permissible formulary method of ascertaining the released value of each and every item of goods in an interstate shipment, and of limiting the shipper's recovery for loss or damage to an amount *not exceeding* the value so computed, or whether Petitioner's Bill of Lading attempts to limit a shipper's recovery to a proportion of the declared value on the entire shipment in contravention of the apparent prohibition contained in the Second Cummins Amendment?

4. Whether Section 1 of Petitioner's bill of lading, providing that the carrier shall be liable for the actual loss or damage of or to any article, takes precedence over Section 1 (b) thereof, providing for a limitation of liability to a proportion of the declared value of the entire shipment if the value so declared by the shipper is less than the full actual value of the shipment, with respect to an article damaged in an amount less than its co-protected or proportionate value?

STATUTES INVOLVED

The statutory provisions directly involved are Section 20 (11) of the Interstate Commerce Act, 49 U. S. C. 20 (11), as made applicable to motor carriers by Section 219 of the Motor Carriers Act of 1935, 49 Stat. 543, 49 U. S. C. 319. They are printed in Appendix B *infra*, pp. 24-28.

Also involved are Sections 216 (d) and 222 (c) of the Motor Carriers Act of 1935, 49 Stat. 543, 49 U. S. C. 316 (d), 322 (c), likewise printed in Appendix B, *infra*, pp. 29-30.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked because of diversity of citizenship, the plaintiff being a citizen of Arizona and the defendant, a Delaware corporation, having its principal place of business in Illinois, and the amount in controversy exceeding the sum of $10,000.00.

After filing of the Complaint and Answer in the district court, the parties entered into an elaborate stipulation of facts (R. 20-26) on which the case was tried.

The ultimate facts disclosed by the stipulation of facts are as follows:

On or about October 1st, 1960, Carl G. Zimmerman (shipper) delivered certain household goods to Allied Van Lines (Allied) for shipment from Westfield, New Jersey, to Scottsdale, Arizona, and Allied issued its non-negotiable Bill of Lading No. 492204 (Exhibit A. R. 7) to the shipper. Shipper, on the face of the Bill of Lading, declared the value of his goods to be $20,000.00 and *released and limited the value and liability* to Allied as provided in Section 1 of the Contract Terms and Conditions on the reverse side of the Bill of Lading. The face of the Bill of Lading reveals that shipper paid a charge of $100.00 for such declared valuation protection, computed at the rate of 50c per $100.00 of declared value.

The van on which shipper's goods were being transported caught fire in Cochise County, Arizona, and as a result, all articles in the shipment were either destroyed or damaged by heat, smoke or water, or by the activities of persons attempting to extinguish the fire.

Allied's Bill of Lading provided, *inter alia*, that:

> "Section 1. The carrier shall be liable for the actual loss or damage of or to any article (except documents, specie or articles of extraordinary value which are not specifically listed in the bill of lading) while being carried or held in storage-in-transit, arising or resulting from any external cause other than an act, omission or order of the shipper, owner of the goods, or a civil or military authority, *provided* that the shipper has declared in writing upon the bill of lading the full actual value of the shipment; otherwise, the liability of the carrier for loss or damage to any such article shall be released and limited:
>
> (a) To 30c per pound of the weight of the lost or damaged article if the shipper has failed to make any declaration of the value in writing upon the bill of lading; or

(b) To a proportion of the declared value of the entire shipment, represented by the percentage which the full actual value of the lost or damaged article bears to the full actual value of the entire shipment if the value so declared by the shipper is less than the full actual value of the shipment."

It was further stipulated that the full actual value of all articles delivered to Allied was $46,578.45; and that the total amount of damage to all articles from the fire exceeded the declared value of $20,000.00.[1]

The shipper offered to confess judgment for $20,000.00 and Allied offered to confess judgment for $11,611.90, including costs accrued to that date (R. 25, 26). The case was tried and argued on the Stipulation of Facts and the district court, the Hon. James Walsh, Judge, entered judgment for the shipper as follows:

"The Court concludes that the correct computation of the defendant's liability to the plaintiff under the provisions of Section 1 of the Bill of Lading is that urged by the defendant. Accordingly, the Clerk will forthwith enter judgment in this cause in favor of the plaintiff and against the defendant in the sum of $11,611.90, together with plaintiff's costs" (R. 28).

Subsequently, the shipper appealed to the Court of Appeals for the Ninth Circuit under a stipulation (R. 31, 32) reciting payment by Allied to the shipper of the amount of the district court judgment for damages and costs, and ac-

---

[1] (Footnote 1. In shipper's Complaint (R. 5); he alleged that he had sustained damages of $26,271.11. This allegation was not controverted by Allied except to the extent that shipper initially stated this amount as his alternative *ad dammum*).

ceptance of this amount by the shipper, without prejudice to shipper's right to appeal said judgment, and further reciting that in the event the lower court judgment should be reversed on appeal, the total sum that would be owing by Allied to the shipper by virtue of the ultimate judgment herein would be the sum of $8,388.10.

The Court of Appeals held that the shipper was entitled to recover the *full value* of each item of goods lost or damaged, even though damaged in an amount less than full value, so long as the total recovery did not exceed the declared value on the entire shipment, and remanded the cause to the District Court with directions to increase the judgment in favor of the shipper by $8,338.10.

REASONS FOR GRANTING THE WRIT

1. Prior to the case at bar, no federal court has been called on to pass upon the validity of nor to interpret and apply Released Rates Orders issued to household goods carriers by the Interstate Commerce Commission pursuant to the authority granted the Commission by the Congress in the Second Cummins Amendment (34 Stat. 593).

It is well-settled that in cases concerning the meaning of federal legislation superceding state statute, and the liability of a regulated common carrier thereunder, the issues must be resolved solely by federal law. *New York, N. H. & H. R. Company* v. *Nothnagel*, 346 U. S. 128 (1953).

In the thirteen-year interval since Petitioner secured Released Rates Order No. MC-309,[2] which is the first of this

---

Footnote 2. Although the Court of Appeals stated in its opinion, 317 F. 2d 72, 74, that "there appears to be no dispute between the parties that the cost paid [by the shipper]

type granted by the Commission to a household goods carrier, there is no reported case from either the federal or state courts construing or applying its terms or passing upon its validity generally or in the light of the Second Cummins Amendment.

The only case found by counsel which might tend to shed any light on the issues on the case at bar, decided since enactment of the Second Cummins Amendment, is the case of *H. R. Mallison & Company* v. *Barrett* (App. Div., Sup. Ct. of N. Y., 1926), 215 App. Div. 524, 213 N. Y. S. 652. In that case the limitation of liability contained or inherent in the carrier's bill of lading was upheld by the majority of the court in a brief opinion relying upon the decision in *Kansas City Southern R. Co.* v. *Carl*, 227 U. S. 639, that the shipper was estopped from recovering for the loss of one bale of silk lost out of five bales shipped, any value greater than the proportionate share of the lost bale in a total declared valuation of $1375, although the actual value of the entire shipment was $4026 and the actual value of the lost bale was $818.50. The majority opinion is too laconic to be persuasive in the case at bar, and the *Carl* case was decided by this court in 1913, three years prior to the enactment of the Second Cummins Amendment.

The value of the *Mallison* case lies in the fact that, in his dissenting opinion, Judge Martin sets forth the history

---

was based upon a rate dependent upon the declared value of $20,000.00 for the entire shipment and that establishment of such rate had been authorized or approved by the Interstate Commerce Commission", the record before it did not include Released Rates Order No. 309, issued to Allied Van Lines, Inc. by the Interstate Commerce Commission on March 28, 1950. For the convenience and information of this Court, the entire text and authenticating data of Released Rates Order No. 309 is set out in Appendix C, *infra*, pp. 31.

of Section 20 (11) of the Interstate Commerce Act through successive changes brought about by the Carmack Amendment of 1906 (34 Stat. 595), the First Cummins Amendment of 1915 (38 Stat. 1196), and the Second Cummins Amendment of 1916 (39 Stat. 441), and the further fact that his opinion points out the necessity of assigning a unit value, on some basis, to each item in a shipment, in order to compute the amount of shipper's recovery on each item lost or damaged in a case where the shipper declares less than the actual value of the merchandise.

In the case at bar, Section 1 (b) of Petitioner's bill of lading contains a formula for computing the value of each item in a heterogeneous collection of used household goods so that the sum total of the individual values aggregates the declared value of the entire shipment, limits the recovery for loss of or damage to an article so valued to an amount not exceeding such value, and limits the shipper's entire recovery to an amount not exceeding the declared value of the sum total of the values borne by the individual items.

Viewed thusly, declared value becomes a *course* or *condition* rather than an *effect* in the computation of cargo loss and damage.

2. The decision of the Court of Appeals, if allowed to stand, would render nugatory and meaningless the provision in Section 20 (11) of 49 U. S. C. that the Interstate Commerce Commission is empowered to make such Released Rates order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation, and the consequent exercise of this power by the Commission in issuing Rates Order No. MC-309 to Petitioner and Petitioner's acquiescence therein by filing an appropriate tariff and publishing its Bill of Lading in accordance therewith.

To obtain full protection (i. e., common law damages) against loss and damage, a shipper can elect to pay double the amount of the carrier's base rate,[3] and he can within the rating structure contained in Released Rates Order No. MC-309 protect his shipment for any amount up to and including full actual value by paying the tariff differential of 50c per $100.00 of declared value. It is certainly within the province of the Interstate Commerce Commission to specify terms and conditions, including the element of co-responsibility, upon which a shipper may obtain protection between the two extremes of common law damages and released or base rate liability of 30c per pound. Otherwise, the Commission would be powerless to prevent carriers from violating the plain meaning and intent of Section 316(d) of 49 U. S. C. and to prevent shippers from violating the plain meaning and intent of Section 322 (c) of 49 U. S. C. It certainly constitutes a "false statement or representation" within the meaning of Section 322(c) for a shipper to declare one value on the carrier's bill of lading as the value of his goods for rating purposes and to later assert a different and much higher value of the goods for the purpose of prosecuting a claim for loss or damage, and claiming the same benefits as if he had paid a higher rate.

3. The decision of the Court of Appeals, if allowed to stand, would be contrary to the interpretation placed upon Released Rates Order No. MC-309 (among others) by the Interstate Commerce Commission itself and would affect methods of adjusting claims for cargo loss or damage followed for many years by the regulated carriers pursuant to such interpretations by the Commission.

Footnote 3. John M. Miller, *Law of Freight Loss and Damage Claims*, 2nd Edition, Paragraph 517.9, page 684.

Examiner Ries in his recent and highly controversial report to the Interstate Commerce Commission,[4] describes the Commission's understanding and interpretation of co-responsibility by citing the following example: "If a shipper declares the lump sum value of this shipment to be $5,000.00 and it is determined that the actual value was $10,000.00, in the event of a loss, the carrier's liability is limited to that portion of the portion of the loss or damage equal to the ratio that the declared value bears to the actual value. In the event of a $100.00 loss or damage, the carrier's liability would be limited to $50.00."[5]

It is submitted that the federal courts should not lightly overturn the Commission's Released Rates Orders issued to household goods carriers and eliminate the entire concept of co-responsibility.

4. The decision of the Court of Appeals, if allowed to stand, would create an irreconcilable conflict in principle between Section 20 (11) and Section 316 (d) of 49 U. S. C.

The decision by the Court below has the practical effect of allowing this shipper to recover approximately 20/26ths of his cargo loss and damage although he paid an increased valuation charge based upon only 20/46ths of the full actual value of his goods. The dollars and cents amount of the

---

Footnote 4. Examiner Richard S. Ries' Report and Recommended Order, served June 15, 1962, in Ex Parte No. MC-1, 19, 61 and 62, *Practices of Motor Common Carriers of Household Goods*, p. 34.

Footnote 5. It is suggested that Examiner Ries conceives of "Coresponsibility" as if it were "co-insurance" and that it may well be the technical concept of "co-insurance" which a regulated carrier may be prohibited from applying to a cargo claim under the circumstances of the case at bar.

benefit conferred upon him by the decision of the Court below is $8,388.10. Translated into terms of dollars and cents of tariff advantage, at 50c per $100.00, this amounts to $42.00.

Inasmuch as Section 316(d) of 49 U. S. C. provides, in part, that it shall be unlawful for any common carrier by motor vehicle engaged in interstate commerce to make, give or cause any undue or unreasonable preference or advantage to any particular person, it is clear that this particular shipper has secured an undue or unreasonable preference or advantage in rate through judicial fiat, which should not be confirmed by this Court from a regulated carrier prohibited by law from volantarily making, giving or causing such undue or unreasonable preference or advantage.

Moreover, the decision of the Court below opens the way for a regulated carrier to violate this Section with impunity through the medium of deliberately allowing favored shippers to underdeclare the value of their goods and to thus obtain the benefit of a lower transportation rate, without assuming a co-ordinate risk of co-responsibility. The undue or unreasonable preference or advantage given to the shipper by the carrier would consist of the carrier's honoring a greater portion of a claim for loss or damage than the risk the carrier has been paid to assume.

5. The decision by the Court of Appeals, if allowed to stand, will affect a very large number of claims and suits for cargo loss and damage where shippers have deliberately declared less than the full actual value of their goods in order to secure the benefit of a lower transportation rate, or where shippers have negligently declared less than the full actual value of their goods and have thus become the beneficiaries of a lower transportation rate.

Industry-wise, during the year 1960, the 43 Class I and 90 Class II interstate household goods carriers transported a total of 829,038 interstate shipments, by far the greater number of which moved under various Released Rates Orders of the Interstate Commerce Commission. It is apparent that with the prevailing ratio of one claim out of every four shipments as reported by the Interstate Commerce Commission itself the potential exists of up to 200,000 claims for cargo loss and damage being presented to the industry annually wherein the factors of "co-protection", "co-responsibility" or "co-insurance" must be taken into account.

Petitioner handles and services approximately 200,000 interstate shipments of household goods during each year, of which it estimates that approximately 65% to 67% are covered by its "Comprehensive Transit Protection" whereby the shippers obtain increased valuation protection in increments of $100.00 by payment of a tariff charge of 50c per $100.00 of declared value.

Petitioner's own statistical studies indicate that a claim for cargo loss or damage is presented to it in about one out of every four shipments, and that its Customer Service Department processes approximately 50,000 claims annually. With the prevailing percentage of shipments which are covered by increased valuation protection, 65% to 67%, this means that Petitioner *alone* is confronted annually with some 35,000 cargo loss and damage claims where "co-protection" or "co-responsibility" is or may be an important factor in adjusting the claims on their merits. Petitioner estimates that in about 50% to 60% of all cargo claims involving its increased valuation protection, or in

---

Footnote 6. Ries, Report and Recommended Order, p. 30.

approximately 20,000 claims annually, it is convinced that the shippers have substantially underdeclared the value of their goods and that Petitioner as a regulated common carrier subject to all of the Provisions of The Motor Carrier Act (Part II of the Interstate Commerce Act) would be remiss in its obligations if it did not reduce the amounts of its settlements in accordance with "co-protection" or co-responsibility",—using those terms as a specific application in the transportation industry of the more generalized term "co-insurance" of the insurance industry.

6. The decision by the Court of Appeals, if allowed to stand, will enable those household goods carriers which merely procure Trip Transit Insurance for their shippers to obtain an undue competitive advantage over carriers which, like Petitioner, elect in effect to "self-insure" their risk by selling increased valuation protection to their shippers in amounts dependent upon the wishes of the shippers and subject to well-delineated and reasonable tariff differentials.

Petitioner operates under Released Rates Order No. MC-309 of the Interstate Commerce Commission. Other large household goods carriers operate under Released Rates Order No. MC-362 of the Commission. Both of these Released Rates Orders (as well as Released Rates Order No. MC-429 of the Commission applicable to the movement of tabulating machines by the household goods movers) provide for application of the base transportation rate when the shipment has been released to a value not exceeding 30c per pound. In addition, they provide that when the shipper releases the shipment at a lump sum value, the base transportation rate applies, plus a value charge of 50c for each $100.00 or fraction thereof of the declared value of the entire shipment. These orders also provide that the rule of co-responsibility shall apply: that is, if the released value

of the shipment is less than the actual value thereof, the carrier's liability shall be limited to that portion of the actual loss or damage represented by the percentage that the released value bears to the actual cash value of the shipment.

The balance of the household goods carriers operate under Released Rates Order No. MC-2-B of the Commission, which is the one most widely used by the carriers. But its provisions, the carriers are authorized to charge a schedule of basic rates for the transportation of household goods released to a value not exceeding 30c per pound per article. The carriers are authorized to increase the base rates by 10 percent when the shipments transported are released to a value exceeding 30c but not exceeding 75c per pound per article and by another 10 percent if the released value exceeds 75c but not 150c per pound per article. Shippers are also given the election of declaring an excess value per pound for specific articles, in which event a charge of 2 percent of the excess value may be assessed.

In practice, most of the carriers operating under the provisions of Released Rates Order No. MC-2-B of the Commission procure for their customers Trip Transit Insurance, in conventional insurance circles, where the shipper wishes to be protected for values greater than base legal liability of 30c per pound per article. Such Trip Transit Insurance policies allow the shippers to declare the value of their goods comprising the shipment; to select between coverage against specified perils and coverage for all risks of physical loss or damage from any external cause, and to pay premiums accordingly. The premium for all risks coverage (which is almost though not quite as broad as Allied's Comprehensive Transit Protection) is 50c per $100.00 of insured value. This premium rate is precisely the same as Allied's tariff rate differential per $100.00 of declared value

and the rates authorized by the Commission in Released Rates Order No.'s 309, 362 and 429.

These Trip Transit Insurance policies uniformly contain the so-called 100% co-insurance clause, reading substantially as follows: "CO/NSURANCE CLAUSE: In consideration of the rate at which this policy is written, this Company shall be liable for no greater proportion of any loss than the amount hereby insured bears to one hundred percent (100%), of the actual cash value of the property described herein at the time when such loss shall happen, nor for more than the proportion which this policy bears to the total contributing insurance thereon".

It goes without saying that a shipper presenting his claim for cargo loss or damage to such an insurance company, under the circumstances of the case at bar, would be confronted with the rigors of co-insurance and that, in this case, the maximum amount he could recover would be $20,000.00/$46,578.45 of $26,271.11, or $11,280.37. The shipper cannot recover more than the co-insured amount of his loss under the well-settled principles of insurance law. 7 Couch on Insurance, Section 1845.

Footnote 7. Taken from a current policy form of the Fireman's Fund Insurance Company, one of the largest underwriters of this class of business in the United States.

Footnote 8. The "co-insured" amount differs from the "co-protected" amount, —it is about $350.00 less— because co-insurance is applied to the total dollar amount of the claim whereas co-protection is applied on an item-to-item basis reserving the unused portion of the protection from an item damaged to a lesser extent than its co-protected value for application toward the balance of the damaged items in the shipment.

CONCLUSION

For the foregoing reasons, this petition for a writ of certorari should be granted.

Respectfully submitted,

JOHN P. MCCARTHY,
Manager, Legal Dep't.,
Allied Van Lines, Inc.,
2120 South 25th Avenue,
Broadview, Illinois.

Attorney for Petitioner.

APPENDIX A.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18,288—May 7, 1963

CARL G. ZIMMERMAN, Appellant, vs. ALLIED VAN LINES, INC., a corporation, Appellee.

On appeal from the United States District Court for the District of Arizona.

Before: ORR, BARNES and JERTBERG, Circuit Judges.

JERTBERG, Circuit Judge:

Appellant, plaintiff below, appeals from a judgment awarding him damages against appellee in the sum of $1,611.90 for loss of and damage to household goods transported by appellee from New Jersey to Arizona.

Jurisdiction of the District Court is founded upon the diverse citizenship of the parties, and the amount in controversy exceeds $10,000.00, 28 U. S. C. §1332. This court has jurisdiction of the appeal under 28 U. S. C. §§1291-1294.

The cause was submitted to the District Court upon a written stipulation of facts under which liability of appellee is admitted.

The basic question on this appeal is whether appellant, as a matter of law, is entitled to judgment in the amount of $20,000.00 instead of the amount awarded by the District Court.

The salient facts contained in the stipulation may be summarized as follows: In October of 1960, at Westfield, New Jersey, appellant delivered certain household articles to appellee for shipment to Scottsdale, Arizona. Appellee undertook the transportation of the articles as a motor and while enroute, the vehicle in which the household articles were carried caught fire. As a result, all articles in the shipment were either destroyed or damaged by heat, smoke and water, or the activities of persons attempting to extinguish the fire.

When appellee received the articles for shipment, it issued to appellant a non-negotiable bill of lading which, in pertinent part, provides:

"SUBJECT TO THE FOLLOWING CONDITIONS:—

"1. RATES, RULES AND REGULATIONS IN ALLIED VAN TARIFF 79C Sec. II in effect on date hereof:

2. . . . . .

3. SHIPPER DECLARES VALUE OF ENTIRE SHIPMENT to be $20,000 and RELEASES AND LIMITS VALUE AND LIABILITY as provided in Section 1 of Contract Terms ON REVERSE SIDE hereof.

NOTICE: UNLESS A GREATER VALUE IS DECLARED, LIABILITY IS LIMITED TO 30 CENTS PER POUND OF AND FOR EACH ARTICLE LOST OR DAMAGED."

(On Reverse side:)

"CONTRACT TERMS AND CONDITIONS

"SECTION 1. The carrier shall be liable for the actual loss or damage of or to any article (except documents, specie or articles of extraordinary value which

are not specifically listed on the bill of lading) while being carried or held in storage-in-transit, arising or resulting from any external cause *other than* an act, omission or order of the shipper, owner of the goods, or a civil or military authority, *provided* that the shipper has declared in writing upon the bill of lading the full actual value of the entire shipment: *otherwise*, the liability of the carrier for loss or damage to any such article shall be released and limited:-

(a) to 30 cents per pound of the weight of the lost or damaged article if the shipper has failed to make any declaration of the value in writing upon the bill of lading: or

(b) To a proportion of the declared value of the entire shipment, represented by the percentage which the full actual value of the lost or damaged article bears to the full actual value of the entire shipment if the value so declared by the shipper is less than the full actual value of the shipment.

"SECTION 2. Shipper shall:

(a) Be liable for any and all charges applicable under carrier's tariffs, and pay therefor as provided in said tariffs; and

(b) Indemnify carrier against loss or damage caused by inclusion in the shipment of explosives or dangerous articles of goods."

As noted, appellant declared the value of the shipment to be $20,000.00. However, the actual value of all articles delivered to the carrier was $46,578.45, and the total amount of damage to all articles exceeds the declared value of $20,000.00.

The claim for loss was filed by appellant within the time and in the manner prescribed by law and the terms of the bill of lading. The appellee gave written notice of disallowance of the claim, whereupon the action in the District Court resulted.

Appellant specifies that the District Court erred as a matter of law by construing the bill of lading issued to appellant by appellee as allowing computation of liability for loss of each article in the shipment by alternative methods, rather than by the application of a uniform method of computation for the loss to each article.

We deem it unnecessary to consider appellant's other specification of error.

49 U. S. C. ≡ 20(11), as applicable to interstate motor carriers under 49 U. S. C. ≡319, imposes liability on the carrier for the full actual loss which occurs to property within its custody but provides that a carrier may limit its liability for loss or damage to a shipment concerning which the carrier is authorized by the Interstate Commerce Commission to establish rates dependent upon the value of the property being declared in writing by the shipper. That portion of 49 U. S. C. ≡20(11), with which we are concerned is as follows:

> "* * * the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, * * * to property, * * * received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, * * *".

The quoted provision is commonly known as the Second Cummins Amendment, 39 Stat. 141 (1960).

There appears to be no dispute between the parties that the cost paid by appellant for the transportation service was based upon a rate dependent upon the declared value of $20,000.00 for the entire shipment and that establishment of such rate had been authorized or approved by the Interstate Commerce Commission.

An examination of the bill of lading discloses that it contains no declaration of value on a per item, or per unit, or per weight basis.

The parties agree that Section 1 (b) of the bill of lading establishes a formula for determining the amount of appellee's liability in respect to each article in the entire shipment, and that the working out of the formula establishes a percentage which limits the maximum amount of liability of appellee on each article contained in the entire shipment. It has been stipulated that loss or damage was occasioned to each article thereof.

The theory of appellant is that he is entitled to recover the maximum amount of liability resulting from the application of the formula in respect to each article in the entire shipment, but that his aggregate recovery on all articles is the sum of $20,000.00, the declared value on the entire shipment.

The theory of appellee is that appellant is entitled to recover the maximum amount of liability resulting from the application of the formula in respect to each article as to which the actual damage amounts to or exceeds the maximum recovery resulting from the application of the formula, but that as to each article whose actual damage is less than the maximum amount of liability resulting from the application of the formula, recovery is limited to the amount of actual damage.

These conflicting theories are more bluntly and tersely stated by appellee (Brief p. 10): "The only trouble is that appellant feels he is entitled to 'formula recovery' on all items, and appellee feels that this is merely a limit on those items damaged in amounts exceeding that limit."

It is to be noted that Section 1 (b) of the bill of lading sets forth only one method for the computation for loss on each article in the shipment and that is by the application of a uniform method, i. e., the liability for loss or damage to each article shall be limited to a proportion of the declared value of the entire shipment, *represented by the percentage which the full actual value of the lost or damaged article bears to the full actual value of the entire shipment, if the value so declared by the shipper is less than the full actual value of the shipment.* (Italics ours). The section does not state that an alternative method may also be used, i. e., actual damage or loss to an article, when such loss or damage is less than the amount produced by the application of the percentage derived from the formula. Appellee justifies the use of the alternative method on the ground that to permit the "formula recovery" in respect to such article would result in unjust enrichment to the shipper in those instances wherein "formula recovery" exceeds actual damage. We are not impressed by the unjust enrichment argument in this case since it appears appellant's loss on the entire shipment exceeds the declared value of $20,000.00. Appellant concedes "that the declaration of a $20,000.00 value creates estoppel against any claim for a greater amount. *A. C. Lawrence Leather Co.* v. *Compagnie Generale Transatlantique*, 18 F. 2d 930 (C. A. 2 1927)."

In our view under the stipulation of facts appellant is entitled to a judgment in the amount of the declared value of the entire shipment. We see no inequity in our holding

since concededly appellant's loss exceeded said amount and t' rate for appellee's service was dependent on the de- nared value of $20,000.00.

The cause is remanded to the District Court, with direc- tions to increase the judgment heretofore entered in favor of appellant by the sum of $8,388.10.

Each party shall bear its own costs on appeal.

(Endorsed) Opinion Filed May 7, 1963.

Frank H. Schmid, Clerk.

APPENDIX B.

Statutes Involved

Interstate Commerce Act

Section 20 (11), 49 U. S. C.,

20, par. (11). Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim.

Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Ter-

ritory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: PROVIDED, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: PROVIDED, however, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Com

merce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: PROVIDED further, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: PROVIDED further, That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: PROVIDED further, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by

the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: And PROVIDED further, That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: And PROVIDED further, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided.

APPENDIX B.

Statutes Involved

Interstate Commerce Act

Section 319, 49 U. S. C.

Application of section 20 (11) and (12) of this title to common carriers by motor vehicle.

The provisions of section 20 (11) and (12) of this title, together with such other provisions of chapter 1 of this title (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to common carriers by motor vehicle with like force and effect as in the case of those persons to which such provisions are specifically applicable.

APPENDIX B.

Statutes Involved

Interstate Commerce Act

Section 316 (d), 49 U. S. C.

Undue preferences or prejudices prohibited.

All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: PROVIDED, however, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

APPENDIX B.

Statutes Involved

Interstate Commerce Act

Section 322 (c), 49 U. S. C.

322 (c). Participation in unjust discrimination; evasion of regulations; penalty.

Any person, whether carrier, shipper, consignee, or broker, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give, or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this chapter, or who by means of any false statement or representation, or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and wilfully assist, suffer or permit any person or persons, natural or artificial, to obtain transportation of passengers or property subject to this chapter for less than the applicable rate, fare, or charge, or who shall knowingly and wilfully by any such means or otherwise fraudulently seek to evade or defeat regulation as in this chapter provided for motor carrier or brokers, shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than $500 for the first offense and not more than $2,000 for any subsequent offense.

APPENDIX C.

INTERSTATE COMMERCE COMMISSION RELEASED RATES ORDER NO. MC-309 RESCINDS RELEASED RATES ORDER NO. MC-305

Application No. MC-489, as amended, under sections 20 (11) and 219 of the Interstate Commerce Act, as amended.

Present: J. Haden Alldredge, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

Allied Van Lines, Inc., a motor common carrier operating under authority of certificate issued in Docket No. MC-15735, Sub 5, having petitioned the Commission for authority to establish and maintain released rates for the transportation and the service of storage of household goods, dependent upon value declared in writing by shipper, or agreed upon in writing as the released value of the property, and the Commission having considered the application, as amended, and good cause appearing therefor:

It is ordered, That, subject to the conditions specified in the succeeding paragraphs hereof, said applicant be, and it is hereby, authorized to establish and maintain by filing and posting in the manner required by the Interstate Commerce Act, rates for the transportation and the service of storage of household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, dependent upon released value as follows:

Released Valuations	Transportation Rate Basis	Storage in Transit Rate Basis
Where the value declared by the shipper in writing upon the bill of lading does not exceed 30 cents per pound for the entire shipment, or where the shipper fails to declare any value for the shipment upon the bill of lading, the carrier's liability for loss or damage shall be limited to a maximum of 30 cents per pound of the weight of and for each article lost or damaged.	Base transportation rate	Base storage rate for the first 60-day period of storage. Thereafter, base storage rate plus a value charge of 10c per $100 or fraction thereof of declared or released value for each storage period of 30 days or fraction thereof after the first 60-day period of storage.

Released Valuations	Transportation Rate Basis	Storage in Transit Rate Basis
Where the value declared by the shipper in writing upon the bill of lading is in excess of 30 cents per pound for the entire shipment but less than the full actual value thereof, carrier's liability for loss or damage to any article in the shipment shall be released and limited to a proportion of the declared value of the entire shipment represented by the percentage which the full actual value of such article bears to the full actual value of the entire shipment.	Base transportation rate with a value charge of 50 cents for each $100 or fraction thereof of the declared value of the entire shipment.	Base storage rate for the first 30 day period of storage. Thereafter, base storage rate plus a value charge of 10c per $100 or fraction thereof of declared or released value for each storage period of 30 days or fraction thereof after the first 30 day period of storage.

It is further ordered, That changes may be made in the rates of charges established under the authority of this order, but the released values provided herein may not be decreased, nor may the value charges as specified herein be increased without the specific authority of the Commission.

It is further ordered, That the order for services and the bill of lading issued for any shipment accepted for transportation and storage at released rates established and maintained under the authority of this order, shall have printed in bold-face type on the face thereof a statement reading substantially as follows:

> **This carrier's liability for loss or damage shall be deemed to be limited to a maximum of 30 cents per pound of the weight of and for each article lost or damaged, unless the shipper declares in writing on the bill of lading a greater value.**

It is further ordered, That Released Rates Order No. MC-305 of November 30, 1949, be, and it is hereby rescinded effective June 30, 1950.

And it is further ordered, That tariffs containing charges established under the authority of this order shall show in connection therewith the following notation:

> Rates or charges herein based on released value have been authorized by the Interstate Commerce Commission in Released Rates Order No. MC-309 of March 28, 1950, subject to complaint or suspension.

This order does not constitute authority for the establishment of released rates or charges on any description of traffic or over the line of any carrier other than as herein specifically indicated.

The Commission does not hereby approve the lawfulness, except under sections 20(11) and 219 of the Interstate Commerce Act, of any rates or charges which may be filed under the authority of this order.

Dated at Washington, D. C., this 28th day of March, 1950.

By the Commission, Commissioner Alldredge.

W. P. BARTEL,
Secretary

(SEAL)

LIBRARY
COURT, U. S.

Office-Supreme Court, U.S
FILED
OCT 4 1963
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

October Term, 1963

No. 452

ALLIED VAN LINES, a corporation,
Petitioner,

vs.

CARL G. ZIMMERMAN,
Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari

Of Counsel
JOHN S. SCHAPER
316 Luhrs Building
Phoenix 3, Arizona

JOHN E. MADDEN
316 Luhrs Building
Phoenix 3, Arizona
Attorneys for Respondent

SORG PRINTING COMPANY OF CALIFORNIA, 180 FIRST STREET, SAN FRANCISCO 5

INDEX

	Page
Introduction	1
Argument	3
I. It Is Neither Necessary nor Appropriate for the Court to Grant Certiorari in This Case for the Purpose of Construing 49 U.S.C. § 20 (11)	3
II. The Court Should Not Grant Certiorari to Consider the Proper Interpretation of Allied Van Lines' Bill of Lading	8
Conclusion	9

CITATIONS

Cases

	Pages
H. R. Mathison & Co. v. Barrett, 215 App. Div. 524, 213 N.Y.S. 652 (1926)	5

Statutes

49 United States Code, Section 10	7
49 United States Code, Section 20 (11)	2, 3, 4, 5, 7
49 United States Code, Section 316 (d)	5, 6
49 United States Code, Section 322 (a)	7

Miscellaneous Authorities

39 Stat. 441 (1916)	3
H.R. Rep. No. 944, 64th Congress, 1st Session (1916)	7
S. Rep. No. 394, 64th Congress, 1st Session (1916)	7
U.S. Sup. Ct. Rule 19, 28 U.S.C.	9

In the Supreme Court of the United States

October Term, 1963

No. 452

ALLIED VAN LINES, a corporation,
Petitioner,

vs.

CARL G. ZIMMERMAN,
Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari

PREFATORY NOTE

Petitioner and Respondent are herein designated by name, or as carrier and shipper, respectively. References to the brief of petitioner seeking certiorari are abbreviated as Pet. Br. References to the opinion of the Court of Appeals are to the pages in Appendix A to the brief of petitioner.

INTRODUCTION

Allied Van Lines' petition for certiorari contains an astounding array of information and conjecture having almost nothing to do with the record and issues of this case. Indeed, it would seem that Allied in preparing its petition may have confused this action with some other case.

Although Allied's approach generates more confusion than clarity, the shipper will not compound the situation

by presenting a separate statement of the questions. It is sufficient to state that the respondent does not consider the questions presented by Allied (Pet. Br. 2-3) to be real issues arising from the record. On the contrary, they are mainly abstract and argumentative interpretations of the Ninth Circuit opinion.

The shipper agrees generally with the facts giving rise to this action as set forth in petitioner's brief. (Pet. Br. 3-6) However, one aspect of Allied's statement of the case must be clarified. The Court of Appeals *did not* hold that the shipper was entitled to recover full value of each item which was damaged or destroyed as Allied's brief blatantly mistates. (Pet. Br. 6) The Court of Appeals simply held that the formula contained in the bill of lading issued by Allied to the shipper governed liability as to each article in the shipment; that in no event could the shipper recover more than the formula liability for loss to any article—an amount always less than the actual value of the article; and that the formula recovery was $20,000.00, that being the declared value of the shipment *in which all items were damaged or destroyed.** (See Pet. Br. 22) The significance of this point cannot be understated.

The shipper urges that the Court initially examine the briefs filed in the Court of Appeals, and study Section 1(b) of the bill of lading issued by Allied Van Lines (See Pet. Br. 18-19), and the provisions of 49 U.S.C. § 20(11). (Pet. Br. 20) Both the bill of lading and statute are complex, and some understanding of each is absolutely essential to consideration of the questions and arguments in this matter.

*The mathematical aspect of computing liability is discussed at length in Appellant's Opening Brief, p. 14, and Appellee's Brief, p. 9, in the Court of Appeals.

ARGUMENT

The argument made by Allied in support of its petition for certiorari involves two main points: First, Allied urges that the Court should construe 49 U.S.C. § 20(11) in relation to the peculiar facts here involved—primarily because of the imagined ramifications which will follow from the Court of Appeals' opinion as interpreted by Allied. Second, Allied contends that the Court of Appeals improperly determined the meaning of the limitation of liability clause in Allied's bill of lading.

The first argument involves more imagination than merit. The second argument is one of minimal public and private interest with which this Court should not be concerned as a basis for granting certiorari.

I. It Is Neither Necessary nor Appropriate for the Court to Grant Certiorari in This Case for the Purpose of Construing 49 U.S.C. § 20(11).

A. The Meaning of 49 U.S.C. § 20(11) in Relation to Allied's Bill of Lading Is Not an Essential Matter for Determination in This Case.

Allied has urged (Pet. Br. 6) that the Court grant certiorari herein because no federal court has ever considered the meaning of 49 U.S.C. § 20(11) in relation to Released Rates Orders issued by the Interstate Commerce Commission.* Concededly, the meaning of the statute has never been passed upon in any federal decision; and as stated by Allied, *H. R. Mallison & Co. v. Barrett*, 215 App. Div. 524, 213 N.Y.S. 652 (1926), is "the only case even remotely in point." (Pet. Br. 7)

*The portion of 49 U.S.C. § 20(11) related to this matter is commonly known as the Second Cummins Amendment, 39 Stat. 441 (1916), which allows a carrier to limit common law liability for loss to a shipment concerning which the carrier is authorized by the Interstate Commerce Commission to establish rates dependent on the declared value of the shipment.

However, it must be borne in mind that the Court of Appeals resolved this case without making any direct interpretation of the Second Cummins Amendment, and without even remotely construing that statute. In effect, the Court of Appeals found—by implication—that the limitation clause of Allied's bill of lading was consistent with 49 U.S.C. § 20(11).* For all practical purposes, that holding was in Allied's favor, and Allied is in no position to have this Court modify, explain, or elaborate on the ruling in that regard.

Thus, the correct meaning of 49 U.S.C. § 20(11) is not an essential issue which this Court should feel obligated to resolve. While, as an abstract matter, the shipper is not in full agreement with the implied approval given Allied's bill of lading by the Court of Appeals, this Court should not now consider, on an abstract basis, the validity of the bill of lading under 49 U.S.C. § 20(11).

B. The Court of Appeals Decisions Did Not Render 49 U.S.C. § 20(11) Nugatory or Meaningless in Any Respect.

Allied conceives of the Ninth Circuit decision as some type of pandora's box which has opened the transportation industry to discrimination and unfair competition in rate charges. (See Pet. Br. 8, et seq.) Respondent is at a loss to understand the process of mystic extrapolation upon which Allied has founded this contention.

Apparently, Allied believes that the lower court decision somehow usurped the rate-making power granted the ICC by 49 U.S.C. § 20(11). This is not correct. The decision

*The shipper urged in the Court of Appeals that Section 1(b) of Allied's bill of lading was inconsistent with 49 U.S.C. § 20(11). (See Appellant's Opening Brief, p. 6-13, in the Court of Appeals.) The Ninth Circuit refused to consider this argument, and limited its opinion to a construction of Allied's bill of lading. (See Pet. Br. 20.)

merely construed a specific limitation clause (See Pet. Br. 22) and applied that clause to a specific fact situation. The decision in no way altered the powers of the ICC to establish rates and related liabilities for motor carriers.

There is nothing in the record to show how the ICC established the rate structure under which Allied operates.* There is nothing to show that the rate charged the shipper in this case was not made dependent on the declared value of the shipment, pursuant to 49 U.S.C. § 20(11). There is nothing before this Court to indicate that the Court of Appeals has done anything more than pass upon the meaning of a single limitation of liability clause. It cannot follow from this that the power of the ICC under 49 U.S.C. § 20 (11) has been rendered meaningless, or abrogated in any way.

Obviously, the Interstate Commerce Commission has authority pursuant to 49 U.S.C. § 20(11) to make whatever Released Rates Orders as may be appropriate to more clearly define carrier liability—if necessary in the light of the Court of Appeals' decision. If Allied is so vitally concerned about potential liability, it would be more appropriate to submit the problem to the ICC than to attempt to convert this Court into a rate-making body to consider a single factual situation involving a single carrier.

Further, the Allied contention (Pet. Br. 10) that the decision below creates some conflict between 49 U.S.C. § 20(11) and 49 U.S.C. § 316(d) is specious. The prohibition of 49 U.S.C. § 316(d) against rate discrimination or preference is not abrogated or affected in any way by the opinion of the Court of Appeals.

*Released Rates Order No. MC-309, referred to by Allied throughout its brief, and set forth in Appendix C (Pet. Br. 31a-35a), is *not* a part of the record in this case.

The basic premise of Allied's claim of conflict is that the shipper in this case recovered 26 26 of his cargo loss and damage after paying an increased rate charge based upon 20 46 of the value of the shipment. Allied claims that carriers can now circumvent 49 U.S.C. § 316(d) with impunity by allowing shippers to undervalue cargo, pay low rates, and collect for damage to freight in excess of that for which they have paid. This is pure nonsense.

The shipper in this case paid a rate based on a declared value of $20,000.00 The rate was in no way related to actual value nor was it based upon protection of 20 46 of the shipment. The shipper did not receive any benefit of $42.00 in rate (Pet. Br. 11) by recovery of the declared value.* Allied actually conceives of the establishment of a rate dependent on and related to the loss of a shipment before the loss occurs and the amount of loss is known. This nonsequiter is not only inconsistent with every concept of logic and mathematics known to man, it is contrary to the provision of Allied's own bill of lading establishing the rate as 50c per $100.00 of declared value.

Certainly, no carrier can discriminate in rates to shippers by following Allied's theory. All shipping rates must still be dependent on declared value in accordance with 49 U.S.C. § 20(11). Claims must be paid consistent with limitations established by the ICC, and no carrier could violate 49 U.S.C. §316(d) by gratuitously paying shippers for any damage not sustained or for which the shipper had not obtained protection under the rate charged. Again the so-called "question" is one which the I.C.C. has full power and

* If the shipment had been totally destroyed, there would be no question about the shipper's right to recover the full $20,000.00. Obviously, the rate charged would be identical in that situation and it is meaningless to state that the shipper received a $42.00 rate benefit because his shipment was not entirely destroyed.

authority to consider, and Allied's contention should be placed before that body and not be presented to this Court.

As a collateral point, Allied claims that a shipper may now violate 49 U.S.C. § 322(e) by stating a low declared value of a shipment and later asserting a higher value for the purpose of prosecuting a freight damage claim, thus obtaining an improper rate advantage by false representation. However, Congress in adopting 49 U.S.C. § 20(11) expressly provided that a declaration of value less than actual value would not be considered a violation of section 10 of the Interstate Commerce Act.* See *H.R. Rep.* No. 944 and *S. Rep.* No. 394, 64th Congress, 1st Session (1916). 49 U.S.C. § 20(11) expressly approves declarations of value less than actual value. So does the ICC, and so does Allied's bill of lading. A declaration by a shipper of less than actual value is entirely legal and could not result in unlawful rate preference in any way.

Finally, Allied treats the Court to a lengthy statistical review of freight claims, cites various ICC Released Rates Orders, and discusses the concepts of co-insurance and co-responsibility. (Pet Br. 11 et seq.) All of this is far beyond the record, and is obviously submitted in an effort to convince the Court that a small fire in Cochise County, Arizona, will bring rate chaos to the transportation world. The shipper takes no credit for such a monumental result, primarily because such a result does not exist.

All of the statutes involved in this action have the same meaning as they did before this case was brought. The Interstate Commerce Commission has no more and no less authority than it ever had. Allied Van Lines is apparently doing business as usual. In the final analysis, these are the results of the decision of the Court of Appeals.

*49 U.S.C. § 10 prohibits various falsifications for purpose of giving or obtaining reduced shipping rates.

II. The Court Should Not Grant Certiorari to Consider the Proper Interpretation of Allied Van Lines' Bill of Lading.

When this case is stripped of the complexities, which Allied would superimpose by the semantics involved in concepts of "co-insurance" and "co-responsibility" for damage to interstate shipments, the only dispute is the proper interpretation of Section 1(b) of the bill of lading issued by Allied.

The opinion of the Court of Appeals on this point is worthy of quotation:

> "It is to be noted that Section 1(b) of the bill of lading sets forth only one method for the computation for loss on each article in the shipment and that is by the application of a uniform method, i.e., the liability for loss or damage to each article shall be limited to a proportion of the declared value of the entire shipment, *represented by the percentage which the full actual value of the lost or damaged article bears to the full actual value of the entire shipment, if the value so declared by the shipper is less than the full actual value of the shipment.* (Italics ours.) The section does not state that an alternative method may also be used, i.e., actual damage or loss to an article, when such loss or damage is less than the amount produced by the application of the percentage derived from the formula. Appellee justifies the use of the alternative method on the ground that to permit the 'formula recovery' in respect to such article would result in unjust enrichment to the shipper in those instances wherein 'formula recovery' exceeds actual damage. We are not impressed by the unjust enrichment argument in this case since it appears appellant's loss on the entire shipment exceeds the declared value of $20,000.00." (Pet. Br. 22.)

In the light of this opinion, the entire problem of which Allied complains could be solved by Allied's clarification of

the language of the bill of lading so as to specify that an alternative method of computing damage would be used in certain circumstances. If this were done, there would then be no question as to whether the bill of lading provided for coinsurance (or co-responsibility) as Allied would understand it. Thus, Allied's petition for certiorari is actually founded on the notion that the bill of lading should be rewritten by this Court so as to define what Allied wants the bill of lading to mean, but what the Court of Appeals said it did not mean.

CONCLUSION

Allied's brief in support of the petition for certiorari is a classic example of abstract logic ignoring the realities of this litigation. More important, Allied has not demonstrated that the Court of Appeals committed any error, misconstrued any federal law, or passed upon a question of real consequence. On the contrary, Allied is concerned solely with Allied's interpretation of the Ninth Circuit's opinion.

The petition for certiorari contains nothing of substance which would justify review under Rules of this Court, U.S. Sup. Ct. Rule 19, 28 U.S.C. Respondent submits that the Court has no alternative to do other than refuse the issuance of a writ of certiorari herein.

Respectfully submitted,

JOHN E. MADDEN
[illegible] Building
Phoenix, Arizona

Attorneys for Respondent

Office-Supreme Court, U.S.
FILED
OCT 24 1963

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 452

ALLIED VAN LINES, a corporation,
Petitioner,

vs.

CARL G. ZIMMERMAN,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN P. McCARTHY,
Manager, Legal Dep't.,
Allied Van Lines, Inc.,
2120 South 25th Avenue,
Broadview, Illinois,
Attorney for Petitioner.

CHAMPLIN RIBBLY COMPANY CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 452

ALLIED VAN LINES, a corporation,
Petitioner,

vs

CARL G. ZIMMERMAN,
Respondent

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioner feels compelled to file this Reply to Respondent's Brief in Opposition because of the savagery of Respondent's attack upon Petitioner's concept of the *real* meaning and impact of the decision of the Court of Appeals upon it as a regulated motor common carrier of used household goods for hire, upon its Bill of Lading in its entirety, upon the Contract Terms and Conditions of its Bill of Lading, and upon the Released Rates Order issued to it by the Interstate Commerce Commission pursuant to the authority granted the Commission by Sections 20(11) and 319 of 49 U. S. C. Moreover, Petitioner sincerely believes

that, viewing its Bill of Lading as a contract of carriage having any existence or validity separate and apart from the provisions of Released Rates Order No. MC-309, the Court of Appeals erred in applying only Section 1(b) of Petitioner's Bill of Lading in this case, and that this aspect of the matter is of such importance to the body of law dignified by the term Transportation Law that this Court can and should grant *Certiorari* in order to interpret and apply the loss and damage provisions of Petitioner's Bill of Lading governing cargo loss and damage claims which present the element of a substantial underdeclaration of value by a shipper

ARGUMENT

I

It Is Both Necessary and Appropriate for the Court to Grant Certiorari in This Case for the Purpose of Construing Petitioner's Bill of Lading in the Light of 49 U S C No. 20(11).

Petitioner is not asking this Court to construe Section 20(11) of the Interstate Commerce Act generally or as an academic problem, but rather to construe Petitioner's Bill of Lading in the light of Section 20(11). Petitioner wishes to point out that the language employed by it in the Contract Terms and Conditions of its Bill of Lading pertaining to cargo loss and damage very slavishly follows the language contained in Released Rates Order No. MC-309 of the Interstate Commerce Commission, which Released Rates Order is necessarily based upon the Commission's interpretation of Section 20(11) in its entirety, and contends that the Court of Appeals unwittingly construed Released Rates Order No. MC-309, adversely to the Commission's understanding of it, and contrary to this Petitioner's understanding of it as exemplified in its Bill of Lading and applied by it in literally hundreds of thousands of cargo loss and damage claims during the 13 years in which Released Rates Order No. MC-309 has been in force and effect.

Moreover, the decision of the Court of Appeals violates that portion of Section 20(11) which provides that "any common carrier . . . shall be liable . . . *for the full actual loss, damage or injury to such property* caused by it . . ." (Emphasis supplied). This is clearly apparent from the language used by the Court below that "The section (Section

1(b) of Petitioner's Bill of Lading) does not state that an alternative method may also be used, i.e., *actual loss or damage to an article*, when such loss or damage is less than the amount produced by the application of the percentage derived from the formula" (Emphasis supplied). By allowing Respondent to recover the full value, however computed, of certain articles in his shipment which were not destroyed nor totally damaged, the Court below conferred a benefit on this shipper prohibited by Section 20(11),—a benefit which Petitioner is expressly forbidden to confer upon a shipper, one which Petitioner and the Commission most assuredly did not intend to confer upon the shipping public, and one not justified by any known principle of transportation law or the law of compensatory damages. The award of *de facto* punitive damages should be grounded upon something far stronger than a misconstruction of a regulated carrier's Bill of Lading based upon a Released Rates Order promulgated by the Interstate Commerce Commission pursuant to the power granted it by the Second Cummins Amendment to Section 20(11) of the Interstate Commerce Act.

Petitioner feels so strongly about this grievous error committed by the Court below that Petitioner's attorney of record in this Honorable Court took the liberty of filing with the Clerk of this Court as a Supplemental Record a Certified Copy of the Petition for Rehearing filed in the Court of Appeals by Petitioner's former attorneys of record, in which counsel attempted to point out the patent absurdity of applying only Section 1(b) of Petitioner's Bill of Lading when Section 1 of Petitioner's Bill of Lading very plainly states that "The carrier shall be liable for the *actual loss or damage* of or to any article". (Emphasis supplied.)

With respect to Respondent's mild objection that Released Rates Order No. MC-309 is *not* a part of the record in this

case (footnote to page 5 of Respondent's Brief in Opposition). Petitioner respectfully urges this Court to consider it as part of the record available to it for the reasons assigned in Footnote 2, pp. 6, 7, of its Petition for Writ of Certiorari, and for the further reasons that this Court may take judicial notice of Orders issued by the Interstate Commerce Commission pursuant to specific grants of authority by the legislative branch of the federal government, and that, although this case is an adversary proceeding in every sense of the term, pure questions of law are presented which can be decided upon the record available to this Court.

II

The Court Should, in All Events, Grant Certiorari to Consider the Proper Interpretation of Allied Van Lines' Bill of Lading.

The principal evil of the decision of the Court below is that it applied Section 1(b) exclusively of Petitioner's Bill of Lading Contract Terms and Conditions to the factual situation in the case at bar, ignoring the controlling language contained in Section 1 concerning *"actual loss or damage"* applicable to Released Value claims arising under Section 1(a) and Declared Value Claims arising under Section 1(b).

The decision of the Court below cannot be justified on any known principles of transportation law, contract law, or the law of damages, and this Court should grant *certiorari* in order to reverse the decision of the Court of Appeals and expunge this unsupported and unsupportable decision from the books so that Petitioner, widely known as "The World's Largest and Most Trusted Mover", may be enabled to continue to adjust cargo loss and damage claims in the future

as uniformly, equitably and lawfully as it has done so for the ~~past~~ 13 years while operating under Released Rates Order No. MC-309 and the co-ordinate wording of the Contract Terms and Conditions of its Bill of Lading.

Although this is not a so-called "class action", Petitioner would be remiss if it did not call it to the attention of this Honorable Court that the decision of the Court below, if allowed to stand, will adversely affect the handling and payment of claims by other household goods carriers of stature in the industry who are operating under Released Rates Orders of the Interstate Commerce Commission identical in history, wording and philosophy to Released Rates Order No. MC-309.

Petitioner would also consider itself remiss if it did not point out to the Court that a very high percentage of interstate movements are into the Western States comprising the bulk of the Ninth Circuit,—as witness the phenomenal population growth of Arizona and California, especially—and that the decision by the Court of Appeals for the Ninth Circuit in the case at bar, if allowed to stand, will have a very grave special impact as well as a very serious general impact on the computation and adjustment of cargo loss and damage claims, not only in Declared Value claims but also in Released Value claims because of the scope of the language employed by the Court below in its opinion. The "small fire in Cochise County, Arizona", so lightly referred to by Respondent (page 7 of his Brief in Opposition) although it caused *him* to seek alleged damages of $26,271.11, is in fact a burgeoning conflagration.

CONCLUSION.

For the foregoing reasons, Petitioner reiterates that its petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN P. MCCARTHY,
Manager, Legal Department,
Allied Van Lines, Inc.,
2120 South 25th Avenue,
Broadview, Illinois,

Attorney for Petitioner